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The Story of *Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence

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**THE STORY OF *BOB JONES UNIVERSITY*
V. UNITED STATES:
RACE, RELIGION, AND CONGRESS'
EXTRAORDINARY ACQUIESCENCE**

BY:

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On May 25, 1983, the Supreme Court ruled 8-1 that the United States Internal Revenue Service (IRS) had authority to deny tax-exempt status to Bob Jones University, Goldsboro Christian School, and other private and religious schools with racially discriminatory educational policies. The Court relied on the statute's broad purpose and placed significant weight on Congress' failure to enact legislation to overturn the IRS policy. A complete account of the legislative history, provided here, both supports and undercuts the Court's opinion. More importantly, this story provides an account of the dynamic interaction among a Supreme Court critical of racial integration, a Congress divided on this issue, and a presidency at war with itself. In the end, the story suggests that *Bob Jones* may have a limited role in shaping interpretive methodology, but that the case reveals how all three branches of government (as well as the public) interact to shape a statute's meaning.

The Story of *Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence

Olati Johnson*

"We're in a bad fix in America when eight evil old men and one vain and foolish woman can speak a verdict on American liberties." These were the words of Bob Jones III on May 25, 1983, the day after the Supreme Court ruled 8-1 that the United States Internal Revenue Service (IRS) had authority to deny tax-exempt status to Bob Jones University and Goldsboro Christian School because of their racially discriminatory admissions policies. In the preceding two years, the Bob Jones case had been repeatedly featured in newspaper reports, nightly news segments, and heated public debates. Congress and the executive branch had weighed in on the case and, in the preceding decade, their actions and inactions had helped shape the larger debate surrounding tax exemptions for private schools. In announcing its decision, the Supreme Court would finally confront the question. The civil rights community and others would celebrate the decision but, for many religious groups, the Court would replace the IRS and Congress as the new villain, blamed for infringing the role of Congress and for making policy rather than interpreting law.

Like Bob Jones III, observers often depict the case as a clash of two competing rights: racial equality versus religious free exercise. Yet, if these rights find expression in the case, it is through statutory interpretation. The decision is occupied far less with constitutional doctrine than with determining the plain meaning and purpose behind the tax-exemption statute, and the proper scope of the IRS' power. Those who have studied the Court's statutory analysis are often critical of its failure to adhere to the statutory text and its reliance on congressional inaction. But understanding the historical context—how the IRS, the Congress, the White House, and the

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courts became embroiled in questions involving racial discrimination and private schools—provides, if not a complete defense, crucial context for understanding the Court’s decision.

SEGREGATED PRIVATE RELIGIOUS EDUCATION AND THE TAX CODE

The controversy in *Bob Jones* had its roots in efforts by civil rights groups to curb the growth of racially discriminatory private schools. In 1970, in a reversal of policy, the IRS announced that private schools practicing racial discrimination in admissions and other school programs would no longer receive tax exemptions.¹ Just three years earlier, the IRS had declared that it lacked legal basis for denying charitable qualification to segregated private schools unless they received state aid.² The statute that the IRS would argue permitted this new interpretation, section 501(c)(3) of the Internal Revenue Code, was not new, long predating the controversy over the tax-exempt status of racially discriminatory private schools. To understand how the IRS came to its decision requires understanding the origins of the charitable exemption, and the dramatic legal and social changes of the 1950s and 1960s that would make the charitable exemption central to debates over racial integration and religious autonomy.

THE CHARITABLE TAX EXEMPTION

The notion that charitable corporations should be exempt from tax is older than the federal income tax itself. Many American colonial governments exempted churches from tax by either constitution or custom, and by the nineteenth century many states did so by statute.³ State governments also exempted educational organizations from taxes as early as the 1700s.⁴ Tax exemptions for organizations serving the poor and needy date from the nineteenth century. By 1894, when Congress enacted its first corporate income tax, most states granted tax exemptions in favor of religious and educational institutions, as well as institutions serving the poor.⁵ Following longstanding state practice, Congress exempted from the income tax “corporations, companies and associations organized and conducted solely for charitable, religious or educational purposes.”⁶ In offering an amendment excluding such corporations from taxation, Congressman Henry Tucker (D-Va.) stated only that the provision was intended to ensure that “educational and charitable institutions not suffer under the bill.”⁷

In 1895, the Supreme Court issued an opinion that strongly suggested that Congress lacked power to enact a general federal corporate income tax unless it was apportioned among

¹ See IRS News Releases (July 10, 1970), No. 1052 (July 19, 1970), 7 CCH 1980 Stan. Fed. Tax. Rep. ¶¶ 6790, 6814.

² See Internal Revenue Service, General Counsel Memorandum, In Re Charitable Qualification of Segregated Schools (Aug. 1, 1967).

³ See Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in Research Papers Sponsored by the Commission on Private Philanthropy and Public Needs 2027-28 (1977), available at <http://www.eric.ed.gov/> (last visited DATE). ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/31/88/62.pdf.

⁴ See, e.g., Province Laws 1706-07, C.6 § 2.

⁵ See Belknap, *supra* note 3, at 2025, 2030.

⁶ See Act of Aug. 15, 1894, ch. 349, 28 Stat. 553 (taxing “all corporations organized for profit”); Belknap, *supra* note 3, at 2025.

⁷ Belknap, *supra* note 3, at 2031.

the states.⁸ To comply with that decision, Congress in 1909 imposed a more limited, special excise tax on for-profit organizations, again exempting “religious, charitable [and] educational corporations.” The exemption was limited to nonprofit corporations.⁹ After the Sixteenth Amendment to the Constitution in 1913 gave Congress the power to levy an income tax without apportionment among the states, Congress readopted and expanded the exemptive language of the 1909 statute, adding “scientific” to the list of exempt organizations.¹⁰ In 1917, Congress allowed individuals to claim tax deductions for charitable contributions.¹¹ In 1919, Congress added organizations addressing “cruelty to animals or children.”¹² And, in 1921, Congress expanded the definition of corporations to include “any community chest fund or foundation.”¹³ That same year, Congress included “literary” in the list of exempt nonprofit corporations.

By the time *Bob Jones* arrived at the Supreme Court, section 501(c)(3) exempted from tax “[c]orporations, and any community chest fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals.” Section 170(a) of the tax code provided deductions for “charitable contributions,” defined in 170(c) as contributions to corporations “organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.”

THE MEANING OF “CHARITABLE”

The legislative history of section 501(c)(3) tells us little about whether Congress sought to impose a common-law meaning of charitable—that is that an organization have a function of promoting the public welfare—or whether it used the term more narrowly to mean organizations providing relief to the poor. A sponsor of the 1909 statute described exempt organizations as “devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse,” supporting the broader conception.¹⁴ In reauthorizing the tax exemption for charitable nonprofits in 1938, the House committee report said the exemption is justified because “the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds.”¹⁵

The IRS’ regulations dating from 1923 interpreted charitable in the popular and not common-law sense as applying to organizations operated “for the relief of the poor.”¹⁶ In 1954, however, the Treasury Department published regulations stating that the statute employed “charitable” in its “generally accepted legal sense,” that is to import common-law meanings of “charitable.”¹⁷ At the same time, the regulations suggested that organizations delineated under

⁸ See *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601 (1895).

⁹ See ch. 6, 36 Stat. 11, § 38 (1909).

¹⁰ See ch. 16, 38 Stat. 166, § 11G(a)[2] (1913).

¹¹ See ch. 63, 40 Stat. 300, Title XII, § 1201(2) (1917).

¹² See ch. 18, 40 Stat. 1057, § 231 (1919).

¹³ See ch. 136, 42 Stat. 227, § 231 (1921).

¹⁴ 44 Cong. Rec. 4150 (1909).

¹⁵ H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

¹⁶ I.T. 1800, II-2C.B. 152, 153 (1923). In subsequent years, the Treasury Department promulgated regulations defining “charitable” as organizations that provide “for the relief of the poor.” Treas. Reg. § 111 (1943).

¹⁷ Treas. Reg. § 150 (c) (3), (1)(d)(2), (1)(d)(1)(ii) (1959).

section 501(c)(3) were presumptively charitable and need not separately satisfy the common-law test. Almost two decades later, however, the IRS would take the position that presumptively exempt organizations must satisfy common-law notions of charity, and it would do so in the context of racially discriminatory private schools.

TAX EXEMPTIONS FOR SEGREGATED PRIVATE SCHOOLS

The IRS' policy would be forged in the decades following the Supreme Court's decision in *Brown v. Board of Education*, which declared state-imposed racial segregation in public schools unconstitutional.¹⁸ Ten years after *Brown*, Congress passed the Civil Rights Act of 1964, Title VI of which forbade racial segregation and discrimination in schools that received federal funding. Title VI reflected a principle that federal dollars should not be used to subsidize segregation.¹⁹

The end of formal, *de jure* segregation, however, did not spell the end to informal, *de facto* school segregation. One strategy white parents used to resist integration was to flee the public school system. In the years immediately following *Brown*, thousands of white children flocked to newly created private schools, leaving a minority of white students in many public school districts. In some communities, the white student body moved en masse to a new private school, taking the indicia of the old schools, such as the school colors, symbols, and mascots.²⁰ Pledging massive resistance, many Southern state governments encouraged establishment of private schools, enacting legislation mandating or allowing the closing of public schools to resist desegregation or providing state tax credits and tuition grants to students attending private schools.²¹

As a result, private Southern schools grew exponentially, particularly after passage of Title VI, which put federal pressure on school systems to desegregate.²² One hundred and sixty-eight private schools opened in Mississippi, Alabama, Florida, Louisiana, North Carolina, and South Carolina between 1964 and 1967.²³ Most were openly segregationist and operated by secular organizations.²⁴ White citizen's councils, for instance, operated more than 150 all-white "segregation academies" in the South, serving more than 9,000 students.²⁵

In the 1960s, Christian evangelical churches, which were expanding exponentially at the time, began opening segregated academies and, by the 1970s, Christian private schools would

¹⁸ 347 U.S. 483 (1954).

¹⁹ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

²⁰ See David Nevin & Robert E. Bills, *The Schools That Fear Built: Segregationist Academies in the South* 14, 25 (1976).

²¹ See United States Commission on Civil Rights, *Discriminatory Religious Schools & Tax Exempt Status* 4 & n.15 (Dec. 1982).

²² See United States Senate, Select Committee on Equal Educational Opportunity [hereinafter Select Committee] 193 (Comm. Print 1972) (statement of Reese Cleghorn, Director, Leadership Project, Southern Regional Council, Atlanta, Georgia, (July 1, 1970)).

²³ *Id.* at 1932.

²⁴ See Nevin & Bills, *supra* note 20, at 12-13 (1976).

²⁵ See Select Committee, *supra* note 22, at 1933 (statement of Reese Cleghorn).

outnumber the secular schools.²⁶ The schools stemmed from community reaction to increased secularism in public schools, such as the banning of school prayer, as well as from resistance to integration.²⁷ Yet racial beliefs and religion became intermingled in the mission and founding concepts of some of the religious schools, leading some observers to claim that “Christian schools and segregation academies are almost synonymous.”²⁸

This rise in segregated academies and the adoption of Title VI of the 1964 Civil Rights Act provided the backdrop for the IRS’ decision on October 15, 1965, to suspend action on applications for tax-exempt status. Yet, after two years of study, the IRS issued a revenue ruling on August 2, 1967, concluding that private, segregated schools could be denied tax exemption only where “[s]tate action for constitutional purposes” was found.²⁹

THE GREEN LITIGATION

Black parents in Mississippi challenged the IRS’ policy. The year that Congress enacted Title VI, Mississippi authorized tuition grants to allow white children to attend private schools. That year two new private schools opened in school districts facing court-ordered desegregation. By 1967, forty-nine new private schools had opened in Mississippi, all but one of which was all white.³⁰

In 1969, a district court declared Mississippi’s tuition grant program unconstitutional,³¹ but, in the absence of any state assistance or support, these private schools would continue to qualify for federal tax-exempt status. The Lawyers Committee for Civil Rights Under Law (LCCR), founded in 1963,³² challenged the policy. Representing five black families in Holmes County, Mississippi, LCCR claimed that the IRS’ policy violated constitutional and statutory prohibitions on state aid to racially discriminatory organizations, as well as section 501(c)(3). A three-judge court ruled in plaintiffs’ favor, preliminarily enjoining the IRS from granting additional tax-exempt letters to Mississippi private schools.³³

IRS RESPONSE: A NEW POLICY ON SECULAR AND RELIGIOUS SCHOOLS

The IRS did not wait until the entry of a permanent injunction to alter its policy. The Treasury Department had come under increased pressure by some in Congress and by civil rights groups to change its policy on private schools. The Senate Select Committee on Equal Educational Opportunity chaired by Senator Walter Mondale (D-Minn.) held hearings in July 1970 that featured critics of the IRS’ exemption policy. Top officials within the Nixon

²⁶ See Paul Boyer, *The Evangelical Resurgence in 1970s American Protestantism*, in *Rightward Bound: Making America Conservative in the 1970s* 33 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (describing the rise of evangelicalism in the 1970s).

²⁷ See Nevin & Bills, *supra* note 20, at 21, 25-27.

²⁸ Joseph Crespiño, *Civil Rights and the Religious Right*, in *Rightward Bound: Making America Conservative in the 1970s* 96 (2008).

²⁹ 7 CCH 1967 Stand. Fed. Tax Rep. ¶6734.

³⁰ *Green v. Kennedy*, 309 F. Supp. 1127, 1133 (D.D.C 1970).

³¹ *Coffey v. State Educ. Fin. Comm’n*, 296 F. Supp. 1389 (D. Miss. 1969).

³² See Charles A. Lester, *The History of the Lawyers’ Committee for Civil Rights Under Law 1963-2003*, available at <http://www.lawyerscommittee.org/about?id=0003> (last visited DATE).

³³ *Green*, 309 F. Supp. at 1137-38.

administration were divided for several months on whether to change the policy.³⁴ While the secretary of Health and Education and Welfare (HEW) favored changing the policy, President Nixon, who had wooed Southern voters in the 1968 election, initially appeared to support maintenance of the existing policy. By July 1970, however, President Nixon changed his mind, supporting the denial of tax exemptions to private segregated schools.³⁵ In mid-July 1970, five months after the *Green* court's preliminary injunction, the IRS issued two news releases stating that it would no longer allow tax exemptions for private schools unless they announced a racially nondiscriminatory policy as to students.³⁶

On June 30, 1971, the *Green* court granted a permanent injunction preventing the IRS from issuing tax exemptions to segregated Mississippi private schools. Authoring the opinion for the three-judge panel, Judge Harold Leventhal reasoned that segregated private schools were not "charitable" within the meaning of the public law because they operated contrary to federal public policy against racial discrimination.³⁷ The court also rejected the constitutional freedom-of-association claims raised by a group of intervening white families.³⁸ The intervenors appealed the case to the Supreme Court, where it was summarily affirmed.³⁹

A few months later, the IRS published a revenue ruling essentially adopting the reasoning of the *Green* court.⁴⁰ Private schools that discriminated on the basis of admission in the administration of educational and other school-administered programs could not be considered charitable within the meaning of sections 501(c)(3) or 170(a). Both provisions incorporated common-law notions that charitable trusts could not be illegal or contrary to public policy. While private discrimination in schools was not illegal, "federal policy against racial discrimination is well-settled," as reflected in judicial pronouncements such as *Brown* and Title VI.

The following year, the IRS issued a revenue ruling outlining the guidelines for determining whether a school's admissions policy was nondiscriminatory, and providing information on model methods for publicizing racially nondiscriminatory policies.⁴¹

CONGRESSIONAL REACTION

The IRS' actions elicited conflicting responses from Congress. The Senate Select Committee on Equal Educational Opportunity (noted above) held new hearings after the IRS changed its policy. Chairman Mondale criticized the Nixon administration's efforts to enforce the new policy as meager, calling its actions a "complete hoax."⁴² The final committee report

³⁴ See Peter Milius, *US to Tax Segregated Academies*, Wash. Post, July 11, 1970, at A1; Select Committee Hearings, *supra* note 22, at 1941.

³⁵ See Boyer, *supra* note 26 at 94-95.

³⁶ IRS News Releases (July 10, 1970), No. 1052 (July 19, 1970), 7 CCH 1980 Stan. Fed. Tax. Rep. ¶¶ 6790, 6814.

³⁷ *Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C. 1970).

³⁸ *Id.* at 1168.

³⁹ *Coit v. Green*, 404 U.S. 997 (1971).

⁴⁰ See Rev. Rul. 71-447.

⁴¹ See IRS Rev. Proc. 72-54, 2 C.B. 834 (1972).

⁴² See Select Committee, *supra* note 22, at 1931 et seq.; see also *id.* at 2026, 2017-26.

issued in 1972 recommended that the IRS and the Department of Education take strong, meaningful steps to enforce the IRS policy.⁴³

Others in Congress were less content with the IRS' position. Along with Senator Strom Thurmond (R-S.C.), Senator James Allen (D-Ala.) decried the IRS' decision on the Senate floor, terming the decision "unfair," "heartless," and "threaten[ing to] the very existence of private schools in the South."⁴⁴ Joined by senators from Mississippi and Alabama, Allen immediately introduced legislation to overturn the policy.⁴⁵ In 1970-71, members of Congress introduced bills in both chambers to thwart the IRS' implementation of the exemption policy. A typical bill sought to prevent the IRS from revoking the tax exemption of a private school in the absence of a judicial finding that the school had racially discriminatory admissions practices.⁴⁶ Members introduced similar bills in 1973 and 1975—fewer than in the preceding years and with fewer co-sponsors. The bills were referred to the relevant committees, but never received hearings.

By the late 1970s, the IRS' efforts to strengthen enforcement of the tax-exemption policy finally produced a legislative response. In 1975, the IRS issued a revenue ruling creating stricter guidelines for determining whether a school was in fact nondiscriminatory.⁴⁷ Among other requirements, the guidelines required that a school include a nondiscrimination policy in its charter, brochures, and catalogues; publicize its policy by public notice broadly to the community; maintain racially nondiscriminatory policies with respect to employing staff; operate all scholarships and loans on a racially nondiscriminatory basis; and keep data on the racial composition of its student body, faculty, administrative staff, and the scholarships and loans awarded. Schools were required to annually certify that they had complied with the requirements, and the IRS could revoke the exempt status of noncomplying schools. Also in 1975, the IRS adopted a revenue ruling that made clear that the guidelines on racial discrimination applied to private schools operated by churches.⁴⁸

Criticism by the United States Commission on Civil Rights and the Civil Rights Division of the Department of Justice led the IRS to adopt even stronger guidelines.⁴⁹ In July 1976, the plaintiffs in *Green* reopened that litigation, alleging that the IRS had failed to comply with the court's injunction and that racially discriminatory private schools in Mississippi were receiving tax exemptions. A week later, parents of black children attending public schools in seven states undergoing desegregation filed a nationwide class action in *Wright v. Regan*. The *Wright*

⁴³ See Senate Select Committee on Equal Educational Opportunity, *Toward Equal Educational Opportunity* 269 (Francesco Cordasco ed., 1974).

⁴⁴ See 116 Cong. Rec. 21,120-22 (July 14, 1970) & 24,427-33 (July 15, 1970) (statement of Sen. Allen); 116 Cong. Rec. 24,836, 24,906-07 (July 17, 1970) (statement of Sen. Thurmond).

⁴⁵ See S.335, 91st Cong. (2nd Sess. 1970).

⁴⁶ See H.R. 68, 92nd Cong. (1st Sess. 1971). Thomas Abernethy (D-Miss.), who introduced the bill, would retire at the end of the 92nd Congress. William Nicholas (D-Ala.) introduced a similar bill, see H.R. 2352, 92nd Cong. (1st Sess. 1971) as did William Edwards (R-Ala.), see H.R. 5350 92nd Cong. (1st Sess. 1971). Edwards would introduce similar bills in the 93rd Congress (1973-1975) and in the 94th Congress. See H.R. 1394, 93rd Cong. (1st Sess. 1973); H.R. 3225, 94th Cong. (1st Sess. 1975).

⁴⁷ See Rev. Proc. 75-50, 1975-2 C. B. 587.

⁴⁸ See Rev. Rul. 75-231, 1975-1 C.B. 158.

⁴⁹ See United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974; Volume III: To Ensure Equal Educational Opportunity* (1975) reprinted in *Tax Exempt Status of Private Schools: Hearings Before the Subcomm. On Oversight of the House Comm. On Ways & Means*, 96th Cong., 1st Sess. 217-220 (1979) [hereinafter 1979 *House Hearings*]; *id.* at 4 (Jerome Kurtz, IRS Commissioner).

plaintiffs similarly challenged the adequacy of the IRS' enforcement procedures, and the district court would eventually order the two cases consolidated.⁵⁰

In response to the lawsuits, the IRS proposed new guidelines in August 1978, but withdrew them after a storm of protest by private-school parents, religious groups, and others.⁵¹ Several members of Congress introduced bills to prevent the IRS from finalizing the guidelines proposed in August 1978.⁵² After receiving comments and public testimony, the IRS in February 1979 issued new guidelines that were weaker than those proposed in August 1978, but stronger than existing guidelines.⁵³ Under the new guidelines, schools formed in connection with public school desegregation and that had insignificant minority enrollment would now have to make a special showing to rebut a presumption of racial discrimination.⁵⁴ The regulations allowed a safe harbor for schools with minority enrollment of 20%.

Opposition by some members in Congress to the IRS' new guidelines intensified in 1979. Members introduced bills to prevent the IRS from implementing the new guidelines or to more broadly curb the IRS' power to deny schools tax-exempt status in the absence of a judicial finding of discrimination.⁵⁵ In February 1979, the Subcommittee on Oversight of the House Ways and Means Committee held a hearing in which representatives complained that the new guidelines placed too great a burden on private schools to disprove discrimination.⁵⁶ Many members made clear that they did not approve of racial discrimination, with some emphasizing that the IRS had authority to withdraw tax-exempt status for racially discriminatory schools as it had done in 1970.⁵⁷ But the 1979 guidelines, several members complained, went further than merely mandating nondiscrimination and effectively required quotas or affirmative action.⁵⁸ Although a minority voice on this issue, Senator Strom Thurmond called into question the IRS' power to take *any* action on racial discrimination without congressional authorization.⁵⁹ Witnesses and members of Congress also raised concerns about the potential burden on religious schools, as some denominations had few black members.⁶⁰ Other representatives and witnesses were supportive of the IRS' guidelines.⁶¹ Some civil rights groups called for the stronger guidelines that the IRS had initially suggested in August 1978.⁶²

⁵⁰ See *Wright v. Regan*, 65 F.2d 820, 822-26 (D.C. Cir. 1981) (detailing history of the cases).

⁵¹ See 43 Fed. Reg. 37296-37298 (1978); Stuart Taylor Jr., *Tax Exemption Ruling: An Old Question Still Lingers*, N.Y. Times, June 14, 1983, at B.16 [hereinafter *An Old Question*].

⁵² See, e.g., S. 103, 96th Cong., (1st Sess. 1979).

⁵³ See Proposed Revenue Procedure on Private Tax-Exempt Schools, 44 Fed. Reg. 9451-9455 (1979).

⁵⁴ See *id.* at 9452.

⁵⁵ See, e.g., S. 990, 96th Cong. (1st Sess. 1979); S.995, 96th Cong., (1st Sess. Apr. 1979); H.R. 96, 96th Cong. (1st Sess. 1979).

⁵⁶ See, e.g., 1979 *House Hearings*, *supra* note 49, at 255 (Rep. Gradison, R-Ohio); *id.* at 305 (Rep. Butler, R-Va.), *id.* at 312 (Rep. Goldwater, R-Calif.); *id.* at 318-19 (Rep. Hansen, R-Idaho).

⁵⁷ See *id.* at 1261 (Rep. Edwards, R-Ala.); *id.* at 1262 (Rep. Evans, D-Ind.).

⁵⁸ See *id.* at 304 (Rep. Butler, R-Va.) and *id.* at 1261 (Rep. Edwards, R-Ala.).

⁵⁹ See *id.* at 586 (Sen. Thurmond, R-S.C.).

⁶⁰ See *id.* at 280-89, 299-301 (BJU attorney William Ball); *id.* at 312 (Rep. Gradison, R-Ohio); *id.* at 331-35 (Rep. Rudd, R-Ariz.).

⁶¹ See *id.* at 390-93 (Rep. Ford, D-Tenn.); *id.* at 310-12 (Rep. Edwards, D-Calif.).

⁶² See, e.g., *id.* at 461-67 (statement of Bill Lann Lee (Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.)).

The Subcommittee on Taxation and Debt Management of the Senate Committee on Finance held its own hearing on April 1979. Chairman Robert Byrd of West Virginia (D-W.Va.) (a former member the KKK) set the tone for the hearing, decrying the IRS for having exceeded its statutory authority and casting the new guidance as a “threat” to the “diversity” represented by private schools.⁶³ Providing equal educational opportunities was a laudable goal, Bryd stated, but the IRS regulations went beyond equal opportunity to in effect require “racial quotas.”⁶⁴ Other senators echoed Bryd’s arguments.⁶⁵ By the time of this hearing, the *Bob Jones* and *Goldsboro* cases had been decided in the trial court, and a significant portion of the hearing was devoted to testimony by senators and witnesses on the specific burdens that the regulations posed to religious schools.⁶⁶ Like the House, the Senate also heard testimony from witnesses supporting the IRS policy.⁶⁷

Later in 1979, Congress adopted two amendments to the 1980 appropriations bill that prevented the IRS from enforcing the new regulations. One amendment, introduced by Representative Robert Dornan (R-Calif.), prohibited the IRS from using appropriated funds to enforce the 1978 and 1979 IRS guidelines.⁶⁸ Representative John Ashbrook (R-Ohio) introduced an amendment barring the IRS from using appropriated funds to “formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious or church operated schools under Section 501(c)(3) unless in effect prior to August 22, 1978.”⁶⁹

In the floor debates, most supporters of the Dornan and Ashbrook amendments focused their concerns on the 1978 and 1979 IRS guidelines, and did not explicitly question the IRS’ earlier rules.⁷⁰ The House committee report accompanying the 1980 appropriations act emphasized that the IRS’ role was to enforce and clarify tax laws, “not to expand them,” suggested that the 1978/79 guidelines might be inconsistent with legislative intent, and urged

⁶³ *Tax Exempt Status of Private Schools: Hearing Before the Subcomm. On Taxation & Debt Management of the Senate Comm. On Finance*, 96th Cong. 1st Sess. 18 (1979) (Sen. Byrd, D-W.Va.).

⁶⁴ *Id.* at 18-19.

⁶⁵ *See, e.g., id.* at 24 (Sen. Jepsen, R-Iowa); *id.* at 47 (Sen. Helms, R-N.C.).

⁶⁶ *See, e.g., id.* at 19 (Sen. Hatch, R-Utah); *id.* at 21 (Sen. Laxalt, R-Nev.); *id.* at 94-176.

⁶⁷ *See, e.g., id.* at 64 (Arthur Flemming, Chairman, United States Commission on Civil Rights); *id.* at 73 (Eric Schnapper, Staff Counsel, NAACP Legal Defense Fund).

⁶⁸ *See* Section 615 of the Treasury Postal Service and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 577 [hereinafter 1980 Appropriations Act].

⁶⁹ Section 103 of the 1980 Appropriations Act, 93 Stat. 562.

⁷⁰ *See, e.g.,* 125 Cong. Rec. 18815 (1979) (Rep. Dornan, R-Calif., stating that his “amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50.”); *id.* (Rep. Miller, R-Ohio, indicating that the “IRS already has significant authority to act, and indeed, has done so in the past where evidence of discrimination exists”); *id.* at 18817 (Rep. Luken, D-Ohio, that the IRS should use existing guidelines rather than shift the burden to schools to prove nondiscrimination); *id.* at 18446 (Rep. Ashbrook, R-Ohio, that his “amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched,” and stating that the IRS “can continue to review [and] still impose detailed recordkeeping requirements on the schools.”); *see also id.* at 18447 (similar).

further study by Congress.⁷¹ More than three-quarters of House members voted for the Ashbrook amendment.⁷² In the Senate, the amendment was adopted by only four votes.⁷³

An additional congressional action that did not directly involve private schools would eventually feature in the *Bob Jones* litigation as well. In 1976, Congress passed a law denying tax-exempt status to social clubs if their charter, bylaws, or written policy statements allowed “discrimination against any person on the basis of race, color, or religion.”⁷⁴ The district court had ruled that discriminatory social clubs could receive tax-exempt status, and Congress’ action effectively disapproved of that decision.⁷⁵ The Senate and House committee reports accompanying the bill included a footnote citing *Green’s* holding (affirmed by the Supreme Court) that racial discrimination “is inconsistent with an educational institution’s tax-exempt status, and also with its status as a charitable contribution donee.” The reports then stated that “[i]n view of national policy, it is believed that it is inappropriate for a social club” that discriminates in written policy to receive tax-exempt status.⁷⁶

THE BOB JONES AND GOLDSBORO LITIGATION IN THE LOWER COURTS

As Congress and the Treasury Department debated the tax-exemption policy in the 1970s, the *Bob Jones* and *Goldsboro* cases would wind their way to the Supreme Court.

GOLDSBORO CHRISTIAN SCHOOL

It is unclear whether Goldsboro Christian School in Goldsboro, North Carolina, would have embraced the description of “segregation academy.” Dr. Ed Ulrich, pastor of the Second Baptist Church in Goldsboro, helped found the school in 1963 on the eve of school desegregation in Wayne County, North Carolina, a county whose population was more than half African-American, and by 1973 Goldsboro had a student enrollment of 750 students, from kindergarten through twelfth grade.⁷⁷

⁷¹ See *Treasury, Postal Service & General Government Appropriations Bill, 1980*, H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 14-15 (1979).

⁷² See Cong. Quart., *Congressional Roll Call 1979: A Chronology & Analysis of Votes in the House and Senate 96th Congress, First Session*, House Vote 302, at 90-H (Ashbrook Amendment adopted 297-63).

⁷³ See *id.*, Senate Vote 252, at 44-S (Helms Amendment adopted 47-43). Senator Metzenbaum (D-Ohio) put forward a motion to reconsider the Helms amendment, which was rejected by the same margin. See *id.* Senate Votes 253 & 254, at 44-S. Senator Javits’ motion to strike the Dornan amendment was rejected by the Senate 31-54. Bills introduced in 1981 seeking to forbid the IRS from revoking the tax exemptions of private schools in the absence of a judicial finding of discrimination failed to receive a hearing or a vote in Congress. See, e.g., H.R. 332, 97th Cong. (1st Sess. 1981); H.R. 995, 97th Cong. (1st Sess. 1981); H.R. 1096, 97th Cong. (1st Sess. 1981); H.R. 802, 97th Cong. (1st Sess. 1981).

⁷⁴ Pub. L. No. 94-568, 90 Stat. 2697 (1976) was adopted in the House and the Senate by voice vote without discussion. See C.Q. Almanac 1976, *Social Club Discrimination*.

⁷⁵ See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972).

⁷⁶ See S. Rep. No. 1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976); H.R. Rep. No. 13, 7-8 & n. 5, 94th Cong., 2d Sess. 8 (1976).

⁷⁷ See Complaint, *Goldsboro Christian Sch., Inc. v. United States*, 461 U.S. 574 (1983) (No. 81-1), Joint App. at 6 [hereinafter *Goldsboro J.A.*]; Robert R. Mayer et al, *The Impact of School Desegregation in a Southern City* 31 (1974). After several preliminary efforts, the Goldsboro school district in 1969 merged the two previously segregated high schools into one integrated school.

From its inception, the school forbade the admission of black students, maintaining that God “separated mankind into various nations and races,” and that such separation “should be preserved in the fear of the Lord.”⁷⁸ Several founders opposed the Supreme Court’s rulings on racial integration, and at least one source describes Goldsboro Baptist and other fundamentalist churches as the central and most enduring opponents of school integration in Goldsboro.⁷⁹ Moreover, despite their claims that segregation was a matter of faith, Goldsboro did not separate all races, only blacks.⁸⁰ Still, many of the school’s founders would deny that their aim was to resist desegregation, instead claiming disapproval of the “deteriorating moral climate” of public schools and the Supreme Court’s decision forbidding prayer in public school as factors motivating the school’s creation.⁸¹

BOB JONES UNIVERSITY (BJU)

The Reverend Robert Reynolds Jones founded his university in 1927 well before the racial changes of the 1950s and before the expansion of Christian Protestant evangelicalism in the 1960s and 1970s. Born in 1883 on a small farm in Dale County, Alabama, Bob Jones was fourteen when he hosted his first evangelical meeting. By age fifteen he was licensed to preach in the Methodist Church. He preached throughout the Deep South, conducting meetings and revivals in churches, tents, or specially constructed tabernacles.⁸² By 1927, Bob Jones was one of the most successful and famous evangelists in America.⁸³

Bob Jones University was an antidote to the corrupting influence of secular education, seeking to combine religion with “high cultural and academic standards.”⁸⁴ Founded in Florida, BJU moved to Greenville, South Carolina, in the late 1940s, where it incorporated as “an eleemosynary corporation” on November 20, 1952. Successive generations of Jones sons have headed the institution. In May 1948, Bob Jones Jr. became president of the university, and Bob Jones III followed him in 1971.

The articles of incorporation announce the school’s purpose: “to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures.”⁸⁵ At the time of the litigation, BJU included students from kindergarten through graduate school, and enrolled 5,000 students.⁸⁶

⁷⁸ See Complaint, Goldsboro J.A. at 10.

⁷⁹ See Plaintiff’s Answer to Interrogatories and Request for Production of Documents, Goldsboro J.A. 32; Mayer, *supra* note 76, at 35. (“Such groups are opposed to the mixing of the races and quote the scriptures to support their position.”).

⁸⁰ The school had admitted students who were part-Japanese, the argument being that blacks would be less likely to tolerate the school’s policy of racial separation. See Deposition of Dr. E.E. Ulrich (the school’s first chairman of the board and principal), Goldsboro J.A. at 90-91.

⁸¹ Indeed, meaningful school integration in Goldsboro did not come until the 1970-71 school year. See Mayer, *supra* note 76, at 35.

⁸² See Melton Wright, *Fortress of Faith: The Story of Bob Jones University* 28, 32 (1960).

⁸³ See Daniel L. Turner, *Standing Without Apology: The History of Bob Jones University* 11, 23 (1997).

⁸⁴ See Wright, *supra*, note 81, at 45.

⁸⁵ Plaintiff’s Trial Exhibit 2, Certificate of Incorporation by the Secretary of State, Bob Jones Univ. v. United States, No. 81-3, J.A. 119 [hereinafter Bob Jones J.A.]. J.A. 119.

⁸⁶ *Id.* at 893.

From its inception, the school excluded black students.⁸⁷ The asserted reason was that the Bible forbade the “intermingling” of the races. In public pronouncements, BJU took some care to distinguish between separation of the races and racism. Slavery and denial of educational access for blacks were wrong, and born-again Christians of all races could co-exist peacefully. Only racial mixing violated the scripture.⁸⁸

LOWER COURT RULINGS

BJU’s tax troubles began in 1970 when the IRS announced that it would not maintain tax exemptions for private schools with racially discriminatory educational policies. In response to a November 30, 1970, IRS letter asking BJU to submit information about its admissions policy, the university informed the IRS that it did not admit blacks and that it would not change its policy.

The IRS initiated proceedings to revoke BJU’s tax-exempt status and to hold it liable for unpaid taxes due under the Federal Insurance Contribution Act (FICA) and the Federal Unemployment Tax Act (FUTA).⁸⁹ Claiming that the IRS’ actions were unlawful and would violate its constitutional rights of free exercise, freedom of association, due process, and equal protection, BJU sued to enjoin the IRS’ actions. The district court for the District of South Carolina issued a preliminary injunction,⁹⁰ which was then reversed by the court of appeals.⁹¹ In May 1974, the Supreme Court in *Bob Jones v. Simon* upheld the Fourth Circuit’s decision, holding that the Anti-Injunction Act⁹² prohibited BJU from suing until the IRS had actually collected the taxes.⁹³

On April 16, 1975, the IRS revoked BJU’s tax-exempt status, effective back to December 1, 1970. To challenge this action consistent with the Supreme Court’s decision in *Simon*, BJU paid FUTA taxes of \$21 on one employee. After the IRS denied its request for a refund, BJU brought suit against the IRS to contest the revocation of its tax-exempt status. The IRS counterclaimed in the lawsuit for back taxes in the amount of \$490,000.

As the controversy progressed, BJU changed its policy of denying admission to all blacks. In September 1973, the university allowed any black staff member of the university employed for four or more years to enroll. In May 1975, a month after the IRS revoked its tax-exempt status and after the Fourth Circuit ruled that a private school’s denial of admissions to blacks violated section 1981,⁹⁴ BJU again changed its policy, to permit blacks to enroll. But the

⁸⁷ See Plaintiff’s Answers to Defendant’s Interrogatories and Responses to Requests for Production, Bob Jones J. A. 32.

⁸⁸ See Trial Plaintiff’s Exhibit 1, *Is Segregation Scriptural: Address Given Over Radio Station WMUU*, Bob Jones University, Greenville, South Carolina (Apr. 17, 1960), Bob Jones J.A. 98, 100, 105, 110, 111 (claiming that BJU had planned to build a school like Bob Jones “for colored people” but ran into “agitation”).

⁸⁹ See *id.* at 738-39. Employers are required to pay FICA and FUTA taxes pursuant to 26 USC §§ 3101, 3102, 3121(b)(8)(B), 3301. Section 3306(c)(8) exempts nonprofits from these taxes.

⁹⁰ See *Bob Jones Univ. v. Connally*, 341 F. Supp. 277 (D.S.C.1971).

⁹¹ See *Bob Jones Univ. v. Connally*, 472 F.2d 903 (4th Cir. 1973).

⁹² See 26 U.S.C. § 7421(a) (1954).

⁹³ See *Bob Jones v. Simon*, 416 U.S. 725, 745-46, 750 (1974).

⁹⁴ See *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975); see Trial Transcript, Direct Examination of Dr. Bob Jones, III, Bob Jones J.A. 72.

university still forbade interracial marriages or dating.⁹⁵ These changes did not alter the IRS' decision regarding BJU's tax status, as the IRS contended that the dating policy constituted an "integral part" of BJU's admissions policies.⁹⁶

The bench trial concluded in a victory for BJU. District Judge Robert Chapman found that BJU was a religious, not an educational, institution; thus the IRS' procedure for denying tax-exempt status to racially discriminatory schools was inapplicable.⁹⁷ Even if BJU were an educational institution, the court reasoned, its refusal to allow interracial dating and marriage were religious practices protected from government intrusion by the Free Exercise Clause.⁹⁸ Chapman was unpersuaded by the IRS' statutory argument, contending that the statute contained no additional public-policy requirement and that BJU had satisfied the statutorily enumerated requirements.⁹⁹

Nine months earlier, in a case involving Goldsboro Christian School, a federal district court in North Carolina had come to the opposite conclusion, holding that the IRS' tax-exemption denial was consistent with the statute, and did not violate the constitution.¹⁰⁰ In his ruling, Judge Robert Witherspoon Hemphill adopted the IRS' argument—essentially the one articulated by Judge Leventhal in *Green*—that organizations violating "clearly established" public policy were not "charitable" within the meaning of the statute."¹⁰¹ Hemphill also rejected Goldsboro's claim that the IRS' construction violated the First Amendment, finding any burden on free exercise justified by the government's secular, overriding interest in combating racial discrimination in education.¹⁰²

Bob Jones arrived at the Fourth Circuit before *Goldsboro*.¹⁰³ Over a dissent, the Fourth Circuit reversed the district court's ruling. Relying on Judge Leventhal's *Green* opinion, the court ruled that tax-exempt charities must operate consistently with public policy and that established federal policy prohibited racial discrimination in schools.¹⁰⁴ The Fourth Circuit also relied on two decisions unavailable to the *Green* court. The first was the Supreme Court's holding in *Norwood v. Harrison* that Mississippi's practice of lending textbooks to racially discriminatory private schools was unconstitutional state action.¹⁰⁵ The second was *Runyon v. McCrary*, where the Supreme Court held that racial discrimination in private-school admissions violated section 1981.¹⁰⁶ While *Runyon* did not reach the question of section 1981's applicability

⁹⁵ See Plaintiff's Answers to Defendant's Interrogatories and Responses to Requests for Production, Bob Jones J.A. 32-33.

⁹⁶ *Bob Jones v. United States*, 468 F. Supp. 890 (D.S.C. 1978).

⁹⁷ See *id.* at 893.

⁹⁸ See *id.* at 898.

⁹⁹ See *id.* at 905.

¹⁰⁰ See *Goldsboro Christian Sch. v. United States*, 436 F. Supp. 1314 (D.N.C. 1977). Goldsboro had never received a decision that it was entitled to tax exemption under § 501(c)(3). In conducting an audit of Goldsboro's records for the years 1969 through 1972, the IRS came to the conclusion that, due to its racially discriminatory policies, Goldsboro was not charitable and should pay FUTA and FICA taxes. See *id.* at 1317.

¹⁰¹ See *id.* at 1318 (quoting H.R. Rep. No. 1820, 75th Cong., 3rd Sess. 19 (1939)).

¹⁰² See *id.* at 1319.

¹⁰³ Goldsboro sought reconsideration of the district court's ruling, which was denied. See *Goldsboro Christian Sch., Inc. v. United States*, 1978 W.L. 1275 (E.D. N.C. 1978).

¹⁰⁴ See *Bob Jones Univ. v. United States*, 639 F.2d 147, 151 (4th Cir. 1980).

¹⁰⁵ See *Norwood v. Harrison*, 413 U.S. 455 (1973).

¹⁰⁶ See *Runyon v. McCrary*, 427 U.S. 160 (1976).

to religious schools, the Fourth Circuit relied on *Runyon* as well as *Brown* to find that the government interest in eradicating discrimination was sufficiently compelling to justify any burden revocation of tax-exempt status might place on BJU.¹⁰⁷

Dissenting from the Fourth Circuit's decision in *Bob Jones*, Judge Widener agreed with the district court that BJU was a religious institution not covered by the IRS' ruling.¹⁰⁸ Widener also rejected the majority's reading of the statute. Section 501(c)(3) allowed exemptions for religious *or* charitable organizations; Congress had made no explicit reference to the common-law requirements of charitable trust in the statute, and the IRS lacked the power to take away a benefit granted by Congress. Whatever public policy could be found against forbidding discrimination in private schools could not be said to apply to religious schools. Indeed, the 1964 Civil Rights Act itself exempted some private clubs and religious organizations, and *Runyon* left open the question of section 1981's applicability to religious schools.¹⁰⁹ Widener also relied on Congress' adoption of the Ashbrook amendment forbidding the IRS from adopting rules governing private schools.¹¹⁰ For Widener, this was an instance of an agency using its power unfairly against a small, religious organization based on the group's unpopular beliefs.¹¹¹ The power to tax was the power to destroy, Widener wrote, invoking the famous phrase of *M'Culloch v. Maryland*: The very existence of religious organizations was at stake.¹¹²

Following the circuit precedent created by *Bob Jones*, a separate panel of the Fourth Circuit summarily affirmed the lower court several months later in *Goldsboro Christian Schools v. United States*.¹¹³

IN THE SUPREME COURT

When the Supreme Court granted review of *Bob Jones v. United States* and *Goldsboro Christian Schools v. United States* on October 13, 1981, it had been more than ten years since the IRS first issued its announcement that it would no longer allow tax exemptions for private schools that practiced racial segregation. There was now a substantial history of congressional debate on the question of tax exemptions and private schools. Social and legal understandings of school desegregation had changed. In the early 1970s, the era of formal segregation was still fresh, and the Supreme Court's case law requiring desegregation was at its high-water mark.¹¹⁴ By 1981, federal enforcement of school desegregation was politically contested. The racial origins of the Christian academies that replaced the segregation academies were obscure. Desegregation remedies were politically unpopular even though social norms had changed to make explicit advocacy of segregation unacceptable. The country had moved to the right,

¹⁰⁷ See *Bob Jones Univ.*, 639 F.2d at 153-54. The Fourth Circuit found the government's interest compelling both as to BJU's policy denying admission to blacks, as well as its policy forbidding interracial marriage and dating. *Id.* at 153.

¹⁰⁸ See *id.* at 156.

¹⁰⁹ See *id.* at 162.

¹¹⁰ See *id.* at 160-61.

¹¹¹ See *id.* at 157.

¹¹² See *id.* at 159 (citing *M'Culloch v. Md.*, 4 Wheat. 316 (1819)).

¹¹³ See *Goldsboro Christian Sch. Inc. v. United States*, 644 F.2d 879 (unpub. order) (4th Cir. 1981).

¹¹⁴ See *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968) (finding "freedom of choice" plan unconstitutional); *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1 (1971) (allowing remedies including busing to remove indicia of a segregated school system).

signaled by Governor Reagan's defeat of President Carter and the installation of a Republican majority in the Senate in 1980. (Religious fundamentalists like Bob Jones were instrumental in both coups.) These changes in the social and political climate provided a dramatic backdrop for the Court's consideration of *Bob Jones*.

PRE-ARGUMENT TURMOIL

The change in the presidency would produce the most dramatic events surrounding the Bob Jones litigation in the Supreme Court. The government's *certiorari* brief in *Bob Jones* and *Goldsboro*, filed nine months after President Reagan came into office, argued that there was no conflict in the circuits and that the Fourth Circuit decisions revoking the schools' tax-exempt status were correct. However the government did not oppose the granting of *certiorari*, because some schools were resisting the IRS policy and review by the Supreme Court would settle the law.¹¹⁵ By the time the merits brief was filed in the case six months later, however, the government had reversed its position, arguing now that the IRS lacked power to revoke the schools' tax-exempt status.

After the Court accepted the cases in September 1981, Deputy Solicitor General Lawrence Wallace, a veteran of the Office of Solicitor General (SG) since 1968, planned to continue the Carter administration position supporting the IRS policy. Solicitor General Rex Lee had recused himself because he had served as counsel in a similar case involving the Mormon Church, rendering Wallace the official decision-maker in the *Bob Jones* and *Goldsboro* appeals.

As Wallace began to draft his merits brief that autumn, storm clouds were gathering. Mississippi Congressman Trent Lott, an emerging star in the Republican Party, wrote letters to the Solicitor General's Office and the Treasury Department urging them to change the government's position, which he argued was "completely contrary to the repeated declarations of the Congress."¹¹⁶ Lott framed his argument in terms of rule-of-law and separation-of-powers values: The IRS' action amounted to "unwarranted interference" in private conduct, was not authorized by Congress, and violated the Constitution's prescription "that the *Congress* is to make the laws—not appointed officials."¹¹⁷

Lott's entreaties found an audience within the Reagan administration. Many administration officials had actively opposed the Carter administration's civil rights policies on issues such as desegregation and affirmative action.¹¹⁸ President Reagan's campaign materials had opposed the IRS' attempt to remove BJU's tax exemption. The 1980 Republican platform

¹¹⁵ See Brief for the United States on Petitions for Writs of *Certiorari*, *Goldsboro Christian Sch., Inc. v. United States* (No. 81-1) & *Bob Jones Univ. v. United States* (No. 81-3), at 15.

¹¹⁶ Letter from Rep. Trent Lott to Roscoe Egger, Jr., Commissioner of Internal Revenue (Oct. 30, 1981), reprinted in Harvard Law School, *Program on the Legal Profession: Government Lawyers and Politics* 7 (1983); see also Letter from Rep. Trent Lott to Solicitor General Rex Lee (Oct. 30, 1981), reprinted in Philip B. Heymann & Lance Liebman, *Lawyers for Government: The Case of the Segregated Schools, The Social Responsibilities of Lawyers: Case Studies* 154 (1988) [hereinafter *Social Responsibilities*].

¹¹⁷ See Letter from Rep. Lott to Solicitor General Lee, reprinted in *Social Responsibilities*, supra note 116, at 155.

¹¹⁸ See Richard L. Pacelle, Jr., *Between Law & Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation* 144-45 (2003).

had pledged to “halt the unconstitutional regulatory vendetta launched by Mr. Carter’s IRS commissioner against independent schools.”¹¹⁹

When Wallace circulated his draft brief, Assistant Attorney General (for Civil Rights) William Bradford Reynolds and other executive-department officials mounted an effort to change the IRS’ position. Reynolds had generated controversy soon after his appointment in opposing what he called “involuntary busing.”¹²⁰ Like Lott, Reynolds, and other opponents framed the issue as one of honoring legislative intent and limiting judicial and agency power. Justice and Treasury Department opponents of the IRS’ policy also argued that the IRS lacked a legislative basis for its position, and that providing the IRS power to determine “public policy” had no logical stopping point.¹²¹

By early January 1982, over the objections of Lawrence Wallace, top officials in the Justice Department and Treasury agreed to change the government’s position in the cases.¹²² Apparently, President Reagan himself made the final decision,¹²³ although it is not clear that he understood the legal arguments or their implications.¹²⁴ On January 8, 1982, two days before the government’s brief was due, the administration issued a news release: The IRS would no longer revoke the charitable status of “religious, charitable, or scientific organizations on the grounds that they don’t conform with certain fundamental public policies.”¹²⁵ Only Congress had power to resolve the question of the tax-exempt status of discriminatory private schools. The administration indicated that it would restore Bob Jones’ and Goldsboro’s tax exemptions and thereby moot the cases before the Supreme Court.

The change in position provoked a “widespread outcry” from civil rights groups—the NAACP’s leader called the decision “criminal”—as well as from top Democrats who characterized it as “part of a pattern of capitulation to segregationists.”¹²⁶ A month later, 200

¹¹⁹ Lou Cannon, *President Reagan: The Role of a Lifetime* 459 (2000).

¹²⁰ Norman C. Amaker, *Civil Rights and the Reagan Administration* 34 (1988).

¹²¹ Letter from Rep. Lott to Solicitor General Lee, reprinted in *Social Responsibilities*, *supra* note 116, at 154-55; Statement of R.T. McNamar, Deputy Secretary of the Treasury, Senate Finance Committee 3-5 (Feb. 1, 1982) (discussing deliberations within the Reagan administration on the IRS’ policy) [hereinafter 1982 Senate Hearings]; Statement of Edward C. Schmults, Deputy Attorney General, 1982 Senate Hearings 9-10.

¹²² See *Social Responsibilities*, *supra* note 116, at 148.

¹²³ See Steven R. Weisman, *President Accepts Blame in Dispute on Tax Exemption*, N.Y. Times, Jan. 20, 1982, at A11. When Lott’s October letter asking the administration to support the Christian schools reached the White House, President Reagan wrote on the margins, “I think we should.” Presidential Log of Selected House Mail, reprinted in *Social Responsibilities*, *supra* note 116, at 159.

¹²⁴ See *Social Responsibilities*, *supra* note 116, at 159; Howell T. Raines, *Reagan Aides’ Slip Blamed for Dispute on Tax-Exemption*, N.Y. Times, Jan. 17, 1982, at Sec. 1, 11. While accepting blame, Reagan later claimed that this “was not presented to him as a civil rights issue” and he did not know that these Christian schools practiced “segregation.” Cannon, *supra* note 118, at 459.

¹²⁵ Statement of McNamar, 1982 Senate Hearings *supra* note 121, at 5; Department of the Treasury News Release, *Treasury Establishes New Tax-Exempt Policy* (Jan. 8, 1982), reprinted in *Social Responsibilities*, *supra* note 116, at 167.

¹²⁶ Stuart Taylor, Jr. *Exemptions Bill Assailed At Hearing*, N.Y. Times, Feb. 5, 1982, at A12; Glenn Fowler, *Private Schools Groups Assail Tax Rule Shift*, N.Y. Times, Jan. 10, 1982, at 119; see also Stuart Taylor Jr., *School Tax Ruling Faces a Challenge*, N.Y. Times, Jan. 10, 1982, at 11.

employees of the Justice Department's Civil Rights Division, including half of its attorneys, sent Reynolds a letter protesting the change in policy.¹²⁷

On January 12, 1982, the president issued a statement that he was "unalterably opposed to racial discrimination in any form" and would not knowingly contribute to any organization that supports racial discrimination. The new tax policy was based upon Reagan's "opposition to administrative agencies exercising powers that the Constitution assigns to the Congress."¹²⁸ The "right thing to do" would be "to enact legislation prohibiting tax exemption for organizations that discriminate on the basis of race." On January 18, the president transmitted a draft of proposed legislation to the Congress.¹²⁹

Defending the president's position, administration officials insisted that the key issue was agency authority, not approval of race discrimination.¹³⁰ The Fourth Circuit's interpretation would permit the IRS to make public policy in areas in which public norms were less settled, such as attempting to revoke the tax-exempt status of women's colleges, requiring religious organizations to ordain women, or denying tax-exempt status to hospitals that perform abortions.¹³¹

Yet the administration's bill met a hostile reception in Congress. Civil rights groups, most Democrats, and some Republicans opposed the bill, believing it unnecessary because the IRS already had authority to deny tax exemptions to segregated schools. Conservative groups, on the other hand, were angered by the bill, seeing it as a betrayal.¹³²

While the government and the schools sought to dismiss the case as moot, other events would assure that the case remained alive. On February 18, 1982, the Court of Appeals for the District of Columbia in *Wright v. Regan* enjoined the Treasury Department and the IRS from granting or restoring tax-exempt status to schools that discriminated on the basis of race or that failed to maintain racially nondiscriminatory policies as defined by *Green*.¹³³ As a result, the administration agreed that the *Bob Jones* case was not moot, and filed its merits brief, arguing that the IRS' interpretation of section 501(c)(3) was incorrect. The brief agreed with the Fourth Circuit that the IRS policy did not violate the Establishment Clause. Dismayed by the White House's highjacking the case, Lawrence Wallace initially refused to sign the brief. Ultimately, Rex Lee brokered a compromise in which Wallace signed the brief, but with a footnote stating

¹²⁷ See Stuart A. Taylor, 200 in *U.S. Agency Criticize Decision on Tax Exemptions*, N.Y. Times, Feb. 3, 1982, at A1.

¹²⁸ See White House Office of the Press Secretary, Statement by the President (Jan. 12, 1982), reprinted in *Social Responsibilities*, *supra* note 116, at 169.

¹²⁹ See Proposed Legislation to Amend Internal Revenue Code, Communication From the President of the United States, No. 97-132, 97th Congress 2d Session (Jan. 18, 1982), reprinted in *Social Responsibilities*, *supra* note 116, at 170-74.

¹³⁰ See Statement of Edward C. Schmults, Deputy Attorney General, 1982 Senate Hearings, *supra* note 121, at 2-3, 22.

¹³¹ See McNamar Testimony, 1982 Senate Hearings, *supra* note 121, at 6-7.

¹³² See Martin Tolchin, *Reagan May Back Joint Resolution on Tax Exemptions*, N.Y. Times, Feb. 4, 1982, at A1; Stuart Taylor, *Exemptions Bill Assailed At Hearing*, N.Y. Times, Feb. 5, 1982, at A12.

¹³³ See *Wright v. Regan*, Sec. of the Treasury, Order (No. 76-1426), (D.C. Cir., Feb. 18, 1982).

that the “Acting Solicitor General fully subscribes to the position set forth on question number two, only,” the constitutional question.¹³⁴

At the suggestion of Justice Thurgood Marshall, the Supreme Court on April 19, 1982, appointed William Coleman as *amicus curiae* in support of the Fourth Circuit’s judgment.¹³⁵ A respected lawyer and head of the Washington office of O’Melveny & Myers, Coleman was an African-American graduate of Harvard Law School, had clerked for Justice Frankfurter, served as secretary of Transportation under Gerald Ford, and was the chair of the board of the NAACP Legal Defense & Education Fund (LDF).

The LCCR, the American Civil Liberties Union (ACLU), the NAACP, LDF, and other civil rights organizations submitted briefs urging the Court to uphold the decision of the Fourth Circuit. The National Association of Independent Schools, an association of 900 private elementary and secondary schools, agreed that tax-exempt status should be denied to racially discriminatory schools. Religious groups weighed in on both sides: While the American Jewish Committee and the Anti-Defamation League of B’nai B’rith filed briefs supporting the revocation, the American Baptist Church, the United Presbyterian Church, and the National Jewish Commission on Law & Public Affairs supported BJU. Trent Lott filed a brief in support of Bob Jones, repeating many of the arguments he had presented in his letters to Reagan officials in 1981.

ORAL ARGUMENT

On October 13, 1982, the day of the oral argument, a line formed early outside the Court. By 10 a.m., the courtroom was packed with public spectators, media, and the Supreme Court bar.¹³⁶ Despite the crowds and media interest, the political turmoil did not feature explicitly in the oral arguments. Indeed, the justices asked fewer questions than usual, concentrating their inquiry not on the First Amendment implications of the case, but on the question of statutory construction.

William B. Ball (a graduate of Notre Dame University) argued on behalf of Bob Jones. Arguing before the Supreme Court, Ball had defended the constitutionality of religious schools receiving state aid and represented Amish parents with religious objections to sending their children to public school.¹³⁷ The bench was quiet as Ball presented his argument that the IRS lacked statutory authority for its position, and that a contrary ruling would violate the First Amendment. As Ball prepared to sit down, he was finally asked two questions, both of which suggested the justices had focused early on questions of statutory authority. Would Ball concede that Congress could authorize an exemption? Yes, he did. Did the 1976 legislation denying tax-

¹³⁴ See Lincoln Caplan, *The Tenth Justice; The Solicitor General and the Rule of Law* 58-59 (1987).

¹³⁵ See 50 U.S.L.W. 3837, Brief of *Amicus Curiae* in Support of Judgments Below, *Goldsboro Christian Sch., Inc. v. United States* (No. 81-1) & *Bob Jones Univ. v. United States* (No. 81-3) (Aug. 25, 1982); Letter from Justice Thurgood Marshall to Chief Justice Burger, Apr. 8, 1982, regarding 81-1 *Goldsboro Christian Schools v. United States*, 81-3 *Bob Jones Univ. v. United States*, Papers of Justice Harry A. Blackmun, Box 8, Library of Congress [hereinafter Blackmun Papers].

¹³⁶ See Linda Greenhouse, *Rights Official Defends Tax Break for Racially-Biased Schools*, N.Y. Times, Oct. 13, 1982, at A19.

¹³⁷ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wis. v. Yoder*, 406 U.S. 205 (1972); Wolfgang Saxon, *William Ball is Dead at 82; Defended Religious Rights*, N.Y. Times, Jan. 18, 1999, at B7.

exempt status to discriminatory social clubs amount to “congressional adoption” of the *Green* position? Ball answered no; that legislation was a “very unclear affirmation” of *Green*.¹³⁸

The justices subjected William McNairy, the lawyer for Goldsboro Christian School, to slightly more intensive questioning. A graduate of William and Mary Law School, McNairy practiced tax law in Greensboro, North Carolina. His argument focused on the history and structure of section 501(c)(3). The eight categories of organizations exempted from taxation, McNairy argued, were connected by the disjunctive “or,” giving each term a “separate and distinct meaning.” Satisfaction of any one of the requirements qualified an organization for a tax exemption, and the legislative history provided no support for the notion that Congress intended to suffuse the tax code with the broader common-law meaning of charitable.¹³⁹

Representing the United States, William Bradford Reynolds also focused on the statutory arguments. Didn’t section 170 incorporate the common-law meaning of charitable? No, replied Reynolds, the meaning of “charitable” in sections 170 and 501(c)(3) were the same, and neither meant to embrace the common law. But if “charitable” in section 501(c)(3) meant organizations that provided relief to the poor, wasn’t section 170(c)’s use of “charitable” meant more broadly? No, said Reynolds. Section 170’s use of the term “charitable” was meant to include all organizations listed in section 501(c)(3) as presumptively charitable.¹⁴⁰

Next was William Coleman arguing as *amicus curiae*. Coleman emphasized congressional ratification of the IRS’ decision. Congress had held more hearings “on this issue than perhaps any other issue in Congress,” yet “made no change.”¹⁴¹ Coleman pointed out that numerous bills to reverse the IRS’ interpretation never emerged from committee. And when Congress in 1976 denied tax-exempt status to discriminatory social clubs, it was careful not to dislodge existing case law forbidding tax exemptions to racially discriminatory fraternal lodges.¹⁴² Some of the questions from the bench reflected skepticism about the theory of legislative ratification as well as the extent of agency power. Congress didn’t actually amend the statute to prohibit exemptions for tax-exempt schools did it?¹⁴³ Justice Powell asked: What was the principle limiting the IRS’ ability to determine public policy?¹⁴⁴

OPINION

On May 24, 1983, the Supreme Court ruled 8-1 that the IRS had statutory authority to deny tax exemptions to racially discriminatory religious schools and that such action did not violate the First Amendment.

Chief Justice Burger began the majority decision with an appeal to section 501(c)(3)’s purpose. “It is a well-established canon of statutory construction that a court should go beyond

¹³⁸ Transcript, *Goldsboro Christian Sch., Inc. v. United States* (No. 81-1) & *Bob Jones Univ. v. United States* (No. 81-3), reprinted in 136 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, 1982 Supplement* 757 (Philip B. Kurland & Gerhard Casper eds.).

¹³⁹ *Id.* at 759.

¹⁴⁰ *Id.* at 769-70.

¹⁴¹ *Id.* at 772.

¹⁴² *Id.* at 772-73.

¹⁴³ *Id.* at 774.

¹⁴⁴ *Id.* at 781; Greenhouse, *supra* note 136 at A19.

the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.”¹⁴⁵ The statutory purpose was to codify the common-law notions of charity—a purpose that makes sense of Congress’ deployment of section 170 for “charitable” contributions only. (Unfortunately, section 170 defines charitable contributions with reference to the same list used in section 501(c)(3). Also, the provisions were enacted at different times: Section 501(c)(3) originated in the 1894 income-tax statute, while Congress enacted section 170 in 1917.¹⁴⁶)

The Court then concluded that the legislative history of the original charitable provision, as well as subsequent enactments and amendments, show that Congress intended to adopt the common-law requirement that tax-exempt organizations provide a public benefit.¹⁴⁷ Most of Chief Justice Burger’s evidence for this point consisted of floor statements—the same type of legislative history that he discounted as “scattered” in minimizing the importance of the Ashbrook amendments. His best evidence came from the House committee report accompanying the Revenue Act of 1938, which justified tax exemptions on the public-welfare benefits served by charitable organizations.¹⁴⁸

As a corollary to the public-benefit principle, the Court found that charitable trusts cannot be “illegal or violate established public policy.”¹⁴⁹ Thus, tax-exempt institutions’ purpose must “not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”¹⁵⁰ Relying on Supreme Court cases, federal legislation, and executive action and pronouncements, the Court easily found a compelling public policy in eradicating racial discrimination in public institutions and practices.¹⁵¹ Whether Chief Justice Burger would find that this public policy explicitly extended to racial discrimination in *private* schools, much less to religious schools, is less clear. Chief Justice Burger’s opinion noted that *Norwood* dealt with a “nonpublic institution,” but failed to discuss *Runyon v. McCrary*.

Interestingly, prior drafts of Chief Justice Burger’s opinion were more forceful. The final opinion states that “[o]ver the past quarter of a century, ‘every pronouncement of this Court, myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.’” But Chief Justice Burger’s first draft added that national policy also “discourage[d] such practices in *nonpublic* education.”¹⁵² Invoking *Norwood*, the first draft concluded, “decisions of this Court firmly establish that racially discriminatory private schools are contrary to a most deeply held public policy.”¹⁵³ This sentence was not included in the final opinion, which said instead, “Whatever may be the rationale for

¹⁴⁵ 461 U.S. at 586.

¹⁴⁶ *Id.* at 587 n.10, 588 n.11.

¹⁴⁷ *See id.* at 588 n.12, 599.

¹⁴⁸ *See id.* at 590 (citing H.R. Rep. No. 1860, 75th cong., 3d Sess. 19 (1938)).

¹⁴⁹ *Id.* at 591.

¹⁵⁰ *Id.* at 592.

¹⁵¹ *Id.* at 594-95.

¹⁵² First Draft Opinion, *Goldsboro Christian Sch., Inc. v. United States*, No. 81-1, *Bob Jones Univ. v. United States*, No. 81-3, at 17 (Mar. 7, 1983), Papers of Justice Lewis F. Powell, Lewis F. Powell, Jr. Archives, Supreme Court Case File #81-3, Washington & Lee University School of Law [hereinafter Powell Papers] (emphasis added).

¹⁵³ *Id.* at 18.

such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy."¹⁵⁴

Chief Justice Burger also rejected the claim that the IRS had exceeded its authority. Congress had long given the IRS discretion to interpret the code in light of changing conditions, and discretion was properly exercised here where the policy of all three branches was clear.¹⁵⁵ The opinion was untroubled that the IRS' decision was not the result of internal deliberation, but rather came only after a three-judge panel issued a preliminary injunction in the *Green* case.¹⁵⁶

Chief Justice Burger's final statutory argument was that Congress ratified the decision. While courts should not accord significance to Congress' failure to act, this was no "ordinary claim of legislative acquiescence." Here, the chief justice contended, Congress' "nonaction was significant." Congress had held numerous hearings on the IRS policy; members had introduced more than thirteen bills to overturn the IRS' interpretation, but none emerged from committee (even as other changes were made to section 501). These events, Chief Justice Burger concluded, provided "evidence of Congressional approval" of the IRS policy.

Chief Justice Burger put particular reliance on Congress' passage of section 501(i)—the social clubs provision. Section 501(i) showed that Congress could have explicitly prohibited tax exemptions for private religious schools, and so, as a matter of pure text, section 501(i) supported Bob Jones. But Chief Justice Burger emphasized that the committee reports for section 501(i) found that *Green* had "made clear that racially discriminatory schools should not receive tax-exemptions." In section 501(i), "Congress affirmatively manifested its acquiescence in the IRS policy." In Chief Justice Burger's view the Ashbrook and Dornan amendments revealed only congressional opposition to more stringent substantive standards against private schools.¹⁵⁷

Was ratification the result of congressional silence or of Congress' positive actions? In the first draft, Chief Justice Burger had written that the references to *Green* in the legislative record of section 501(i) cannot be read "other than as indicating acquiescence in the standards then being applied to racially discriminatory private schools."¹⁵⁸ By the final draft, however, "acquiescence" had become "approval."¹⁵⁹

With the bulk of the opinion devoted to the statutory question, Chief Justice Burger's opinion summarily rejected Bob Jones' argument that applying the policy to religious schools violates the Free Exercise Clause. The government had a compelling interest in eradicating racial discrimination that outweighed any free-exercise burdens on religious schools.¹⁶⁰ The IRS' policy was properly applied to BJU, the Court concluded, as prior case law made clear that bans on interracial marriage and dating constituted a form of racial discrimination.¹⁶¹

JUSTICE POWELL'S CONCURRENCE

¹⁵⁴ 462 U.S. at 595.

¹⁵⁵ *Id.* at 597.

¹⁵⁶ *Id.* at 598 n.22.

¹⁵⁷ *See id.* at 602 n.27.

¹⁵⁸ First Draft Opinion, Powell Papers, *supra* note 152, at 25.

¹⁵⁹ *See* 461 U.S. at 602.

¹⁶⁰ *Id.* at 604-605.

¹⁶¹ *See id.* at 605 (citing *Loving v. Va.*, 388 U.S. 1 (1967)).

Prior to oral argument, Justice Powell had seemed skeptical of the ratification theory, writing in his notes that silence on a politically hot issue may not constitute ratification and that if Congress had meant to approve the result in *Green* when it enacted the social clubs provision, “Why didn’t it say so[?]”¹⁶² Justice Powell emerged from conference prepared to uphold the IRS’ policy, but was unconvinced by the chief justice’s statutory argument.¹⁶³ Yet Justice Powell found Coleman’s argument on congressional ratification persuasive.¹⁶⁴ After Chief Justice Burger circulated his first draft, Justice Powell responded that he would concur in the judgment and in part III of the Court’s opinion. “Whether one calls it ratification or acquiescence, I do think it clear—certainly as of now—that Congress has accepted the original ruling that racially discriminatory schools do not qualify for tax exemptions.”¹⁶⁵

In his concurring opinion, Justice Powell disapproved of the majority’s interpretation of section 501(c)(3). A problem with the majority’s opinion was its emphasis on harmony with the public interest, which in Justice Powell’s view ignored the role charitable exemptions play in supporting diverse, conflicting viewpoints, and preventing orthodoxy.¹⁶⁶ If writing on a “blank slate,” Justice Powell would have rejected the Court’s conclusion that the statute gave the IRS the power to decide which charities violate public policy.¹⁶⁷ But Justice Powell found a “decade of acceptance that is persuasive in the circumstances of this case.” This history provided “an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.” Justice Powell found particularly convincing Congress’ enactment of section 501(i), which was an explicit move by Congress to align the policy on social clubs with the policy on private schools.¹⁶⁸

JUSTICE REHNQUIST’S DISSENT

At conference, Justice Rehnquist announced that he would not vote to uphold the IRS’ interpretation.¹⁶⁹ In his solo dissent, Justice Rehnquist agreed with the majority’s resolution of the First Amendment question, but argued that the majority’s opinion ignored the statutory language. The statute was quite clear. Section 501(c)(3)’s plain language delineated all the categories warranting tax exemption, leaving no room for an “additional, undefined public-policy requirement.”¹⁷⁰ That there were successive amendments of the statute broadening the list of tax-exempt organizations made clear that Congress did not intend to adopt the common-law standard.¹⁷¹ Section 170(c)’s use of the term “charitable contribution” was unhelpful, for section 170(a)(1) defined charitable contribution by listing the categories exempt under section 501(c)(3).

¹⁶² Justice Powell’s handwritten notes on Bench Memorandum, Oct. 2, 1982, at 24, Powell Papers, *supra* note 152.

¹⁶³ See Justice Powell’s notes from conference, Oct. 15, 1982, Powell Papers, *supra* note 152; Justice Blackmun’s notes from conference, Blackmun Papers, *supra* note 135, Box 8.

¹⁶⁴ See Justice Powell’s notes from conference, Powell Papers, *supra* note 152.

¹⁶⁵ Letter from Justice Lewis F. Powell to Chief Justice Warren E. Burger, Mar. 8, 1983, in Blackmun Papers, *supra* note 135, Box 8.

¹⁶⁶ See 461 U.S. at 610 (Powell, J., concurring).

¹⁶⁷ *Id.* at 606-07 (Powell, J. concurring).

¹⁶⁸ *Id.* at 607 & n.2 (Powell J., concurring).

¹⁶⁹ Justice Powell’s notes from conference, Oct. 15, 1982, Powell Papers, *supra* note 152.

¹⁷⁰ Bob Jones, 461 U.S. at 613 (Rehnquist, J., dissenting).

¹⁷¹ *Id.* at 617.

Where the majority saw an “unusually strong case of legislative acquiescence,” Justice Rehnquist saw only that a “vigorous debate has existed in Congress concerning the new IRS position.”¹⁷² Congress’ adoption of section 501(i) demonstrated that Congress could have been explicit about prohibiting racial discrimination through the tax code but had chosen not to. The legislative history of the Ashbrook and Dornan amendments contained numerous statements that the IRS lacked power to make public policy. *Bob Jones* was a particularly weak case for ratification, because the IRS policy was not longstanding, was at odds with its prior positions, unsupported by the statutory language and legislative history, and had led to “considerable controversy in and out of Congress.”¹⁷³ Like the Reagan administration, Justice Rehnquist agreed that Congress could have adopted legislation without infringing on the constitutional rights of religious schools. But “Congress has failed to do so. Whatever the reasons for the failure, this Court should not legislate for Congress.”¹⁷⁴

THE AFTERMATH OF BOB JONES

Many pundits celebrated the *Bob Jones* decision as a deserved defeat for the Reagan administration, worse than an “embarrassment” in the words of one journalist, a “humiliation.”¹⁷⁵ *The New York Times* wrote: “Tax-Exempt Hate, Undone” and “President Reagan and the lawyers he has put in charge of protecting civil rights should stand ashamed.”¹⁷⁶ The *Washington Post*’s editorial page described the Reagan administration’s position as a “disastrous legal and political blunder.”¹⁷⁷ Civil rights groups hailed the decision.¹⁷⁸ The relationship between civil rights groups and the Reagan administration would forever be defined, and poisoned, by the bitter contest over the IRS’ authority to deny tax benefits to discriminatory institutions.¹⁷⁹ In subsequent months, the administration continued to stoke the ire of the civil rights community by opposing school desegregation remedies, affirmative action, regulations to combat housing discrimination, and by replacing members of the United States Civil Rights Commission who were critical of Reagan’s civil rights policies.¹⁸⁰

As a matter of prediction of what the rule of law required, Deputy Solicitor General Wallace was vindicated by the Court’s near-unanimous decision in *Bob Jones*. But the Reagan administration never trusted him again.¹⁸¹ Although Wallace remained in the Solicitor General’s Office long after Reagan left the presidency (retiring in January 2003),¹⁸² the structure of the office changed. In the aftermath of *Bob Jones*, the Reagan administration created a new deputy

¹⁷² *Id.* at 620.

¹⁷³ *Id.* at 622.

¹⁷⁴ *Id.*

¹⁷⁵ See Anthony A. Lewis, *Abroad At Home; The Court Says No*, N.Y. Times, May 26, 1983, at A27.

¹⁷⁶ See *Tax-Exempt Hate Undone*, N.Y. Times, May 25, 1983, at A26.

¹⁷⁷ See *Bob Jones University Trowned 8-1*, Wash. Post, May 25, 1983, at A24.

¹⁷⁸ See Paul Taylor, *Defeat for Religious Right, Vindication for Civil Rights Groups*, Wash. Post, May 25, 1983, at A9.

¹⁷⁹ See Caplan, *supra* note 134, at 61.

¹⁸⁰ See Amaker, *supra* note 120, at 157-63; Aaron Epstein, *On Civil Rights Issues, Reagan “Sharpens” Hatchets*, Miami Herald, May 29, 1983, at 13A.

¹⁸¹ Caplan, *supra* note 134, at 61.

¹⁸² *Id.* at 6, 60-61; see also Department of Justice Press Release, Deputy Solicitor General, Lawrence Wallace, to Retire From the Justice Department After 35 Years of Service, Nov. 1, 2002, available at http://www.usdoj.gov/opa/pr/2002/November/02_osg_635.htm (last visited DATE).

solicitor general position, a political appointee who could be trusted to advance the position of the president.¹⁸³

Many in the conservative and Christian evangelical community criticized the result in *Bob Jones*—blaming both the Reagan administration and the Supreme Court.¹⁸⁴ Patrick Buchanan blasted the decision as an infringement on religious freedom, expressing his “hope [that] Bob Jones University has the courage to tell the federal government to go to the devil.”¹⁸⁵ Letters poured into the Supreme Court expressing displeasure at the Court for infringing religious rights and faulting the Court for its reasoning.¹⁸⁶ For one letter writer, the case was a “close second to the school prayer and Bible-banning decisions.”¹⁸⁷ The Court’s invocation of “public policy” and reliance on legislative inaction would come under harsh criticism from commentators and individuals. Many letters would repeat the same line: that the decision revealed the “danger of the Supreme Court making laws when they are specifically forbidden by the Constitution.”¹⁸⁸

That Bob Jones and not Goldsboro became the emblem of the Supreme Court’s decision allowed critics of the decision to sever the IRS’ exemption policy from the historic effort to combat segregation in public and private schools. Indeed, to some in the religious and conservative community, Bob Jones’ policies were not discriminatory, for the school accepted blacks and forbade only interracial dating.¹⁸⁹ One wonders how popular perceptions of the case might have changed had the case been styled *Goldsboro v. United States*. Ironically, the justices choose to list the *Bob Jones* case first despite the fact that the Court had granted the *certiorari* petition in *Goldsboro* first.¹⁹⁰

As for the petitioners themselves, Goldsboro eventually paid its taxes, and agreed to change its admissions policy. According to some sources a few black students eventually enrolled in the school.¹⁹¹ In 1987, however, the church closed the school.¹⁹² BJU on the other hand refused to yield, “We will never change beliefs that we base on the Word of God,” said Bob Jones III after the Court’s ruling.¹⁹³ BJU officials criticized the Court’s decision in a pamphlet to

¹⁸³ See Caplan, *supra* note 134, at 62.

¹⁸⁴ See Taylor, *An Old Question*, *supra* note 51, at B16.

¹⁸⁵ Patrick Buchanan, *The Bob Jones Decision Reflects “New Intolerance”* (June 1983), reprinted in *The Bomb And Its Fallout: Bob Jones University v. United States* 22 (1983) [hereinafter *The Bomb*].

¹⁸⁶ Letter from Rev. Dale Peterson, Paducah, Kentucky, to Harry A. Blackmun, June 22, 1983, at 1, Blackmun Papers, *supra* note 135, Box 365, Folder 9,

¹⁸⁷ *The Bomb*, *supra* note 185, at 21.

¹⁸⁸ Letter from Mr. and Mrs. R.--, Twin Falls, Idaho, to Chief Justice Warren Burger, July 11, 1983, Blackmun Papers, *supra* note 135, Box 365, Folder 9.

¹⁸⁹ Buchanan, *supra* note 185, at 22 (asking “[a]gainst whom is Bob Jones discriminating? All the students who go there attend voluntarily. All voluntarily accept its rules and regulations.”)

¹⁹⁰ See Memorandum from Justice Blackmun to Chief Justice Burger, Blackmun Papers, *supra* note 135, Box 8 (urging that *Bob Jones* become the lead case, because *Bob Jones* was “obviously the primary case, and the other is a tagalong” and because Chief Justice Burger’s opinion “gives priority to *Bob Jones*”).

¹⁹¹ See *IRS Lifts Tax Exemption From Church that Ran All-White School*, Educ. Week, (Dec. 14, 1988).

¹⁹² See *id.*

¹⁹³ Wright, *supra* note 82, at 235.

supporters and alumni (also sent to the justices), urging supporters to increase their giving to the school in the wake of the decision.¹⁹⁴

Nearly two decades later, however, BJU did change its mind. In March 2000, Bob Jones III went on the *Larry King Show* and announced that BJU would permit interracial dating.¹⁹⁵ A statement on BJU's website now apologizes for conforming to the "segregationist ethos of American culture" and for failing "to accurately represent the Lord and to fulfill the commandment to love others as ourselves."¹⁹⁶ Political events might have shaped BJU's decision. Less than a month before, BJU had been thrust into the national spotlight when George W. Bush launched his South Carolina primary campaign at the school. His opponent, John McCain, criticized Bush for associating with the school and for failing to denounce the school's interracial dating policy and anti-Catholic teachings.¹⁹⁷ (Bush later disavowed the school's views on race and Catholicism.¹⁹⁸)

After the Court's decision, the IRS immediately denied tax exemptions to more than 100 private schools that were explicitly racist and that had refused to adopt nondiscrimination statements. The more stringent and contested regulations proposed in 1978 and 1979 to address schools with less explicitly discriminatory policies, however, would never be enforced. While the Dornan and Asbbrook amendments expired in 1982, the Reagan administration's IRS declined to adopt the more stringent review policies.¹⁹⁹ In 1984, the Supreme Court held that the plaintiffs in *Wright* lacked standing to challenge the IRS' process for revoking tax exemptions of discriminatory private schools.²⁰⁰ The IRS continues to adhere to the 1975 procedures that require schools to publicize a statement of nondiscrimination, and the IRS denies tax-exempt status to schools originating in a period of desegregation that cannot demonstrate that they do not racially discriminate in admissions, employment, and other school-related programs.²⁰¹ On at least one occasion, the IRS has revoked the exemption of a private school with a formally open admissions policies but that lacked minority students and had a history of racial exclusion.²⁰² Still, as the era of formal explicit, segregation recedes, the IRS' exemption policy is likely of little contemporary relevance.²⁰³

DOCTRINAL AND THEORETICAL SIGNIFICANCE

Three moves in the majority's opinion provided an easy target for critics: the decision's quick hop over the plain meaning and structure of the statute, the reading of "charitable" to

¹⁹⁴ *The Bomb*, *supra* note 187, at 15.

¹⁹⁵ See Camille K. Lewis, *Romancing the Difference: Kenneth Burke, Bob Jones University, and The Rhetoric of Religious Fundamentalism* 87-89 (2007).

¹⁹⁶ See statement on BJU website, available at <http://www.bju.edu/welcome/who-we-are/race-statement.php> (last visited Dec. 2, 2009).

¹⁹⁷ See *Bob Jones University Drops Interracial Dating Ban*, Christianity Today Mag., Mar. 1, 2000, available at <http://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html?start=1> (last visited DATE).

¹⁹⁸ See *id.*

¹⁹⁹ See Taylor, *An Old Question*, *supra* note 51, at B16.

²⁰⁰ *Allen v. Wright*, 468 U.S. 737 (1984).

²⁰¹ See Rev. Proc. 75-50 (1975); Terry Berkovsky et al., *Private School Update*, 2000 WL 34402226 (I.R.S.).

²⁰² See *Calhoun Acad. v. Comm'r*, 94 T.C. 284 (1990).

²⁰³ See Taylor, *An Old Question*, *supra* note 51, at B16 (noting even in 1983 that "no more than a 'miniscule' percentage of the nation's private and religious schools practice racial discrimination").

incorporate common-law notions of public policy, and the reliance on legislative ratification. In letters to the Court and in the media, these flaws collapsed into one big point: The decision was judge-created public policy masquerading as law. While their criticisms were less colorful, many legal and scholarly commentators were also not persuaded by the Court's rationale.

PLAIN MEANINGS AND PLAIN PURPOSES

It is not hard to see how the majority's reading of 501(c)(3) strains plain meanings. The statute offers a list of exempt organizations in the disjunctive, which would seem to allow an organization to satisfy any one of the listed exemptions. Chief Justice Burger, perhaps, had a stronger argument about section 170(a)'s use of the term "charitable," but this is substantially weakened by section 170(c)(2)(B)'s listing of several types of exempt organizations, again in the disjunctive.

Nor is Chief Justice Burger's self-conscious decision to ignore the literal construction of the statute in service of the "plain purpose" fully convincing. The legislative history provides evidence that Congress meant to require all charities to satisfy general common-law notions that exempt institutions provide a benefit to society. Yet one might argue that these bits of legislative history do not amount to a purpose so "plain" as to defeat the language and structure of the statute.²⁰⁴ Even if the statute's purpose were to exempt organizations serving a public benefit, Congress might have sought to further that purpose through the list of the exempt organizations.²⁰⁵

PUBLIC POLICY AND CONSTITUTIONAL NORMS

Chief Justice Burger is almost certainly correct that executive, judicial, and legislative pronouncements establish a strong public policy against racial discrimination in education. However, as the subtle changes to the opinion draft suggest, whether the policy against racial discrimination existed as to *private* schools—much less as to religious schools—is less clear. We cannot be sure why Chief Justice Burger's opinion gave so little space to *Norwood* and why it ignored *Runyon* in advancing its public-policy argument. It may be that detailing those cases would expose the contested nature of the equality norm as applied to private schools, as well as highlight that those cases did not answer the question of discrimination by religious schools.

Some commentators have faulted the *Bob Jones* Court for filtering equal protection analysis through a questionable interpretation of the statute, thus delegitimizing the opinion and failing to advance the equal protection norms at stake.²⁰⁶ The majority, of course, cites its equal protection holdings when finding a compelling public policy at stake, and the implication of the Court's brief First Amendment analysis is that equal protection norms effectively trump free-exercise claims. But the Court does not hold that equal protection *requires* the denial of tax

²⁰⁴ But see Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 Vand. L. Rev. 1353, 1365 (1983) (arguing that the legislative history supports the majority's holding that exempt organizations must provide a public benefit).

²⁰⁵ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 146 (1994).

²⁰⁶ See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover*, 17 Yale J. L. & Human. 17, 40 (2005).

exemption, as Coleman and other *amici* had argued. Citing its cases on constitutional avoidance, the Court explicitly declined to reach the issue.²⁰⁷

Yet, this avoidance of the constitutional dimensions does not begin with the Court. Statutory authority became the refuge for the other key institutional players in the debate: Congress, the IRS, and the White House. Congressional critics of the IRS policy spoke not of the right of private schools to engage in racial discrimination, but instead argued that the IRS was claiming power properly left to Congress. In justifying their decision to support Bob Jones and Goldsboro, Reagan administration officials too avoided claims of religious freedom and disavowed the racial philosophies espoused by the schools. Rather, their asserted goal in the litigation would be the vindication of the rule of law and separation of powers. The administration's reactive legislative proposal to grant Congress authority to revoke tax exemptions furthered its stance that the IRS' position was morally correct, but lacking in statutory authority.

LEGISLATIVE ACQUIESCENCE

To BJU's own officials, the reliance on legislative ratification was emblematic of the decision's lawlessness, one in which Congress was complicit: "Congress which is answerable to the people and must stand for election every two years, is all too glad that a court, which is not answerable and over which people have no control through the electoral process, has done its work for them."²⁰⁸ Editorial pages lampooned the acquiescence arguments as bad for the Court and bad for Congress. "Isn't it possible that the legislators were not as convinced as the court seems to be that there was an overwhelming public consensus on this issue and that this explains why they preferred to duck it?" asked the *Wall Street Journal*.²⁰⁹ Another commentator claimed that "this sort of jurisprudence contributes to the decay of representative institutions."²¹⁰

The Court itself conceded that legislative inaction is "not often a useful guide" and that its decisions had long cautioned against relying on Congress' failure to act.²¹¹ One problem with relying on legislative inaction is that Congress' failure to act may not indicate approval of a particular interpretation. Constitutional and sub-constitutional rules for advancing legislation, such as the committee system and the filibuster, often assure that it is easier to block legislation than to enact it. Party leaders and committee chairs can control the congressional agenda in ways that thwart the preferences of the majority of congressional members. Moreover under formal conceptions of legislative enactment, courts should not give meaning to any legislative action or silence that has not received approval from both chambers of Congress and been signed by the president.²¹²

In addition, it is unclear what legislative acquiescence is meant to reveal. The *Bob Jones* Court would interpret Congress' "nonaction" as indicating Congress' "approval" of the IRS'

²⁰⁷ See *Bob Jones*, 461 U.S. at 599, n.24.

²⁰⁸ *The Bomb*, *supra* note 187, at 13.

²⁰⁹ *Don't Cheer So Loud*, *Wall St. J.*, May 25, 1983, at 30.

²¹⁰ George F. Will, *Bob Jones U: Why Didn't Congress Act?*, *Wash. Post*, May 29, 1983, at C7.

²¹¹ See *Bob Jones*, 461 U.S. at 600.

²¹² See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 *Mich. L. Rev.* 61, 96 (1988) (detailing doctrinal weakness of acquiescence arguments).

exemption policy.²¹³ Yet whether the interpreter is searching for the plain meaning of the statute, or the intent or purpose behind the statute, then it would seem that the understandings and commitments of the enacting Congress would be most relevant, and not a later Congress' after-the-fact approval of an agency interpretation. Moreover, in this case, Congress' "acquiescence" is less than clear. Congress' inaction "frequently betokens unawareness, preoccupation, or paralysis."²¹⁴ Congress does not speak with one voice; many in Congress spoke repeatedly and loudly against the IRS' policy and questioned the IRS' ability to revoke tax exemptions without congressional approval. The tax exemption had particularly perilous politics because of the array of interest groups and the complex intraparty divisions. Any congressional action was likely to provoke either the ire of tightly organized civil rights interests (supported by moderate Republicans and most Democrats) or religious or anti-integration groups (supported by Southern Democrats and conservative Republicans). Thus, rather than approval, the twelve-year record shows repeated debate, reflecting contestation, and dissension on the question of tax exemptions for racially discriminatory private schools.

If, however, implementing a supposed legislative intent is not the goal of statutory interpretation, the enacting Congress would just provide one possible source of statutory meaning; achieving true coherence in legislation would require that statutes be read against contemporary commitments. Allowing tax-exempt status for racially discriminatory schools would be at odds with contemporary norms against racial discrimination, made manifest in numerous judicial, executive, and administrative pronouncements, including the Court's decisions in *Norwood* and *Runyon*.²¹⁵ True, recent Congresses were conflicted in determining how far the IRS could go in enforcing and furthering that commitment, but the core commitment against racial segregation was well-announced.

Perhaps consideration of the full history behind the tax-exemption policy reveals another possibility: that the Court was correct in its claim that this was an extraordinary case. The Court placed great reliance on what it saw as Congress' approval of *Green* in enacting section 501(i), which revoked tax exemptions for racially discriminatory social clubs. What is most revealing about the committee report is not simply its adoption of the *Green* rationale, but what this signals about the committee's understanding of Congress' role. Congress need not legislate on exemptions for private schools, the committee report suggests, because the IRS and the courts have already decided the issue. In short, Congress was *relying* on the agency-court settlement of the matter of tax exemptions for discriminatory schools when it extended that policy to discriminatory social clubs. For the Supreme Court to overturn that settled understanding would have been a deeply uncooperative interference with the legislative process, one might argue.

Similarly, the full debates on the Dornan and Ashbrook amendments signaled that a majority in Congress was unlikely to tamper with the core commitments reflected in the IRS' 1970 decision. Many in Congress condemned racial discrimination and objected only to what they termed quotas; few openly argued that racially discriminatory schools should receive tax exemptions. The resort to "quotas" may, of course, suggest a shallow commitment to the

²¹³ See *id.* at 601-02.

²¹⁴ See *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969).

²¹⁵ See Resnik, *supra* note 206, at 42 (reading *Bob Jones* as a thick commitment to the constitutional norm of antidiscrimination, a norm sustained not only by the Supreme Court "but through regulations by low level bureaucrats who came to know that they were obliged to implement norms of non-segregation").

antidiscrimination norm—one apparent in the longstanding dissonance between strong public and political support for antidiscrimination and integration norms and profound resistance to specific antidiscrimination remedies.²¹⁶ Yet, these debates revealed that Congress was unlikely to retreat from its support of the 1970 decision.

Last and perhaps most critical are the extraordinary events of 1981 and 1982 leading up to the case: the immense publicity and public uproar after the Reagan administration's change in position; the administration's concession that the IRS policy was correct as a matter of policy and morality; and Congress' unwillingness in 1982 as the case was pending to provide the IRS explicit statutory authority to revoke the tax exemptions of private schools. If, as positive political theory suggests, post-enactment history is relevant in revealing the intensity of preferences of the current Congress, the Court had much information to suggest that Congress would not have the votes to override its interpretation. As Justice Powell would write to Chief Justice Burger, it was certainly clear “as of now” that Congress approved.

DOCTRINAL RELEVANCE

The final question may then be whether *Bob Jones* is too extraordinary to matter much in statutory interpretation doctrine. The Court's holding that tax-exempt organizations must serve a public benefit remains good tax law, though commentators have joined Justice Powell's critique that the Court's articulation of the doctrine disserves the diversity of the nonprofit sector and gives too much discretion to the IRS to formulate public policy.²¹⁷ The appropriate sources for determining what constitutes a public policy and whether a public policy is established or fundamental are similarly unsettled.²¹⁸

But the legacy for interpretive methodology remains unclear. Many Supreme Court and lower court cases citing *Bob Jones* concede the extraordinary nature of its holding and follow the common rule that courts should not give weight to legislative inaction.²¹⁹ There are cases to the contrary, citing *Bob Jones* and considering congressional acquiescence in the face of Congress' “abundant[] awar[eness]” as one factor among many in determining the meaning of the statute.²²⁰ But, even when followed, *Bob Jones*' reasoning on legislative acquiescence is often grudgingly embraced.²²¹

CONCLUSION

²¹⁶ See Michael Murakami, *Desegregation*, in *Public Opinion and Constitutional Controversy*, 34 (Nathaniel Persily et al. eds., 2008) (noting high public support for school integration, but weak support for busing and mandatory assignment to achieve integration).

²¹⁷ See Galvin & Devins, *supra* note 204, at 1365-67 (criticizing the Court's requirement that exempt organizations conform to a common community conscience).

²¹⁸ See Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. Kan. L. Rev. 410-27, 433-37 (2005).

²¹⁹ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (Scalia, J., plurality opinion); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 & n.5; *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007); *Schism v. United States*, 316 F.3d 1259, 1291-97 (Fed. Cir. 2002).

²²⁰ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (1999); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985). For lower court cases, see, e.g., *Bismullah v. Gates*, 551 F.3d 1068, 1974 (D.C. Cir. 2008).

²²¹ See, e.g., *Kimbrough v. United States*, 128 S.Ct. 558, 573 (2007) (citing *Bob Jones* for the proposition that judges should usually not read much into legislative inaction, but finding meaningful similar congressional silence on a high-profile issue); *Dep't of Int. v. Kalmath Water Users Prot. Ass'n*, 532 U.S. 1, 16 n.7 (2001).

What observers have long found compelling about *Bob Jones* are the colorful tales of the Reagan administration's handling of the case. The case is often neglected in the legal canon today, regarded as a "story about politics not law."²²² A full account of the case, however, reveals not just an intriguing story about the Reagan administration, but also a story about the struggle to regulate private education to achieve greater equity in public education and the proper scope of racial remedies—all in the face of claims of religious and associational freedom. What is extraordinary and meaningful about the case is that these rules and norms would be developed through the interplay of all three branches of government and mediated through the meaning of the word "charitable" in the tax code.

²²² Neal Devins, *On Casebooks and Canons or Why Bob Jones University Will Never Be Part of the Constitutional Law Canon*, 17 Const. Comment. 285, 285 (2000).